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No. 06-766

In The
Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, NEIL W. KELLEHER, CAROL BERMAN, HELEN MOSES DONOHUE, and EVELYN J. AQUILA, in their official capacities as Commissioners of the New York State Board of Elections, New York County Democratic Committee, New York Republican State Committee, Associations of the New York State Supreme Court Justices in the City and State of New York, and JUSTICE DAVID DEMAREST, individually, and as President of the State Association, ELIOT SPITZER, Attorney General of the State of New York,

Petitioners,

v.

MARGARITA LÓPEZ TORRES, STEVEN BANKS, C. ALFRED SANTILLO, JOHN J. MACRON, LILI ANN MOTTA, JOHN W. CARROLL, PHILIP C. SEGAL, SUSAN LOEB, DAVID J. LANSNER, Common Cause/NY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE ASIAN AMERICAN BAR ASSOCIATION OF NEW YORK IN SUPPORT OF PETITIONERS

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STATEMENT OF INTERESTS[1]

Amicus Curiae Asian American Bar Association of New York ("AABANY") is a membership organization which represents the interests of approximately 4,000 Asian American attorneys in New York. Since its incorporation in 1989, AABANY has taken an active role in advocating and promoting diversity in the judiciary and has taken positions on legal issues that affect the access of Asian Americans and other minorities to the electoral process.

AABANY filed briefs *amicus curiae* in this Court supporting petitioner's application for a writ of certiorari and in the Second Circuit seeking reversal of the district court decision on the grounds that the district court failed to narrowly tailor its injunctive relief to fit the purported constitutional infirmities set forth in its preliminary injunction decision. Because of the direct and negative impact that the remedy of judicial district-wide open primaries will have on Asian Americans, from both an ethnic diversity and an associational rights perspective, AABANY is in a unique position to aid this Court in understanding the issues presented by the petition, particularly with regard to the district court's improper remedy, which is a subsumed component of the first question presented by petitioners in the petition for a writ of certiorari.

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[1] This brief is filed with the consent of the parties, and letters indicating such consent have been filed with the Court. Pursuant to Rule 37.6, the *amicus curiae* discloses that no counsel for any party in this case authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This Court has previously held that "[i]t is too plain for argument . . . that the State may properly limit each political party to one candidate for each office on the ballot and may insist that intra party competition be settled before the general election by primary election or by party convention." *American Party of Texas v. White*, 415 U.S. 767 (1974), citing, *Storer v. Brown*, 415 U.S. 724, 733-736 (1974). New York State has chosen to have intra-party competition between candidates for its court of general jurisdiction, the New York State Supreme Court, settled in party conventions. Yet, by judicial fiat, the district court jettisoned New York's convention system in favor of the very system New York State intentionally chose *not* to adopt with regard to this office – open primaries. With the stroke of a pen, the state judiciary is now burdened with the prospect of expensive campaigns for electoral office. In doing so, the courts below eviscerated the aspirations of Asian Americans to "meaningfully participate" in their own efforts to seek judicial office because Asian American candidates cannot raise the necessary funds or overcome ethnic bloc voting that is stacked against small minority groups all in the name of amorphously named so-called challenger candidates that by definition lacks support.

Remarkably, the courts below imposed this remedy on the basis of no fact-finding whatsoever. Rather, the courts below imposed an open primary system as a "default" and "interim" remedy, and in the process, swept aside New York's 90 year old convention system.

The courts below imposed this remedy even though the record contains little or no showing that the system is *structurally* deficient. And even if such structural

deficiencies had been shown, the courts below should have mended, not ended, the system. As this Court instructed in *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), injunctive relief must be narrowly tailored to address the constitutional infirmities in question.

The Second Circuit made clear that its standard applied even to "facially valid" convention systems. Petitioners' Appendix at 41 (hereinafter "Pet. App. ___."). As such, the rulings of the courts below amount to a frontal challenge to *American Party of Texas*. In contravention of *American Party of Texas*, the courts below legislated a requirement that the public be afforded direct and unmediated access to New York's judicial nomination process. The standard set by the courts below would expose a variety of existing nomination systems to the possibility of standardless judicial review. For example, the standard set by the courts below could put at risk such systems as the major parties' nomination process for presidential candidates, a process in which party leaders wield considerable and potentially decisive influence. And, taken to its logical conclusion, the rulings of the courts below raise the spectre that successful state-run screening panels would have to open their doors to the electorate if those screening panels serve as meaningful gatekeepers to judicial nominations. These results, which are antithetical to *American Party of Texas*, cannot stand.

SUMMARY OF ARGUMENT

The court of appeals and district court refused to correctly apply *Ayotte* and directed open primaries as an

"interim" remedy based upon a non-existent primary "default" provision supposedly contained in New York's election law.[2] Pet. App. 82 (discussing the purported "default" nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions "[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . . ").

Yet, New York's election law contains no such "default" provision to open primaries for the office of New York State Supreme Court Justice. Rather, Election Law § 6-110 specifically states that a primary election be used "*except as provided herein.*" Election Law § 6-106, in turn, expressly provides that nominations for Supreme Court Justice will be by party convention. Thus, rather than providing for an open primary "default," Election Law § 6-106 actually embodies the legislature's intention to have nominations for this elective office conducted by convention.

Based upon this mistaken reliance upon a non-existent default provision, the courts below imposed an open primary remedy with no fact-finding on the remedy issue. Such fact-finding would have disclosed that the "default" remedy is not warranted.

First, because the record discloses no structural infirmity with the convention system, fact-finding may have revealed that the system could have been improved through more narrowly tailored remedies such as revision of signature requirements, timing, and the number of delegates at conventions.

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[2] The courts below struck down Election Law §§ 6-106 and § 6-124 as unconstitutional. Election Law § 6-106 pertains to party nominations for justices of the New York State Supreme Court. Election Law § 6-124 contains the statutory procedures for judicial conventions. Pet. App. 186.

Second, because of its suspect fact-finding, the courts below relied principally on the thesis that the convention system was flawed because party leaders tend to strongly influence the results. If this were the standard, it would call into question many convention systems, including those of the major national political parties.

Third, because the record focused, at most, on two judicial districts, the remedy ordered by the courts below should not have encompassed the entire state, but should, at most, have been confined to the two judicial districts that were the subject of the courts' fact-finding.

Fourth, the courts below should have taken into account the impact that open primary elections would have on the aspirations of minority candidates seeking judicial office. If the courts below had engaged in proper fact-finding, they would have taken into account the fact that a remedy of judicial district-wide partisan open primary elections has the grave potential of leading to a "tyranny of the majority" to the detriment of Asian Americans, one of the least powerful and most underrepresented ethnic minorities in New York State. The existing nominating system, whatever its flaws, does not present Asian Americans with the same barriers that they may face in a partisan open primary election process. The latter process is one in which voting along ethnic lines would most likely prevail to the detriment of minority groups such as Asian Americans. Indeed, a partisan electoral process is one in which cash is king – again an insuperable barrier to the aspirations of many Asian Americans who generally lack the resources and the political clout to raise the hundreds of thousands of dollars, if not millions of dollars, needed for judicial races in New York.

As a result of the demographic and fiscal challenges posed by a partisan open primary election system, Asian Americans have been virtually shut out of judgeships in the states where such systems prevail. Eight states, encompassing approximately 25% of the nation's population, have partisan election systems similar to the system that the courts below have imposed.[3] From the point of view of Asian Americans, the experiences of these eight states are striking: out of nearly 2,500 judges in those eight states, only *seven judges* are of Asian American descent.[4] A majority of the states with partisan open primary election systems have *no Asian American judges* whatsoever.[5]

ARGUMENT

I. The Courts Below Failed To Properly Apply *Ayotte* Because They Applied Overly Broad Findings Of Fact To Justify An Overly Broad Remedy

Although the Second Circuit acknowledged that "a convention-based system is, in the abstract, a perfectly acceptable method of nomination," Pet. App. 46, it

[3] Peter D. Webster, *Selection and Retention of Judges: Is There One Best Method?*, 23 Fla. St. U. L. Rev. 1, n80 (Summer 1995). The states with partisan election systems are Alabama, Arkansas, Illinois, Mississippi, North Carolina, Pennsylvania, Texas, and West Virginia.

[4] American Bar Association, National Database on Diversity in the State Judiciary, http://www.abanet.org/judind/diversity/national.html#1. The ABA analyzed authorized judgeships in the states for the general jurisdiction appellate and trial court bench.

[5] Webster, *supra*, n81. The states are Alabama, Arkansas, Mississippi, North Carolina, and West Virginia.

nonetheless struck down New York's convention system in its entirety with no explanation as to why the system was *structurally* flawed. At its core, the courts below struck down New York's system because that system tended to produce nominees supported by party leaders. However, as set forth below, such an indictment could be directed at many political convention systems and, as such, this is not an argument that goes to the structure of the New York system. Accordingly, this finding does not justify the remedy of striking down the entire system.

The courts below failed to heed this Court's direction that federal courts should not "nullify more of the legislature's work than is necessary." *Ayotte,* 546 U.S. 320, 326. As this Court instructed, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact." *Ayotte*, 546 U.S. 320, 329 (citing *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985)). Indeed, this Court has provided a clear admonition in the election law context that judicial remedies be narrowly tailored to avoid "reject[ing] state policy choices more than was necessary to meet the constitutional violations involved." *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160-161 (1971)). Thus, in cases such as *United States v. Booker*, 543 U.S. 220 (2005), the Court took great pains to sever and excise only those portions of Title 18 of the United States Code that rendered the Sentencing Guidelines unconstitutional, while scrupulously leaving in place the applicability of the Guidelines to the federal sentencing scheme. Similarly, the courts

below should have used a like surgical technique by only excising any allegedly offending provision.[6]

In *Ayotte*, this Court explained that several interrelated principles support this limitation on judicial remedies.

> "[W]e try not to nullify more of a legislature's work than is necessary, for we know that '[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.' *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) . . .
>
> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from 'rewrit[ing] state law to conform it to constitutional requirements' even as we strive to salvage it. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988). . . .
>
> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot 'use its remedial powers to circumvent the intent of the legislature.' *Califano v. Wescott*, 443 U.S. 76, 95 (1979)."

See supra, 546 U.S. 320 at 329 (certain citations omitted).

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[6] *Cf. Buckley v. Valeo*, 424 U.S. 1 (1976) (in order to save the statute from First Amendment infirmity, the Court engaged in an extensive re-interpretation of the statute, construing the statute as imposing independent reporting requirements on individuals and groups that are not candidates or political committees only in the following circumstances: (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make expenditures for communications that expressly advocate the election or defeat of a clearly identified candidate).

The Second Circuit rationalized that the application of a less intrusive alternative to salvage judicial conventions from the purported constitutional defects would have been "inviting the District Court to act as a one-person legislature superchamber." Pet. App. 80. However, in what is purportedly an "interim" remedy, but in reality amounts to the imposition of a permanent injunction, the district court had no qualms in reducing the number of signatures required by Election Law § 6-136 which would apply to the open primaries. Pet. App. 184. Thus, the rulings of the courts below are internally inconsistent. If it is permissible to amend the signature requirement, it should be equally permissible to "fix" other aspects of the convention system, rather than scrapping it altogether.

If the Second Circuit had considered the various factors, it may have attempted to remedy the supposed constitutional infirmities by such carefully tailored remedies as ordering reductions in the number of signatures required on designating petitions, reduction of the number of delegates at the nominating conventions and/or expansion of the time New York State Supreme Court judicial candidates have to lobby delegates. These remedies would have addressed the fundamental criticisms of the convention process that were the focus of the Second Circuit's opinion. Pet. App. 14, 62-64 (signature requirements); Pet. App. 80 (number of delegates); Pet. App. 18, 80 (lack of time for lobbying).

A. The Courts Below Failed To Properly Apply *Ayotte* Because Of Their Misreading Of The New York State Election Law

The courts below failed to narrowly tailor their relief because they misinterpreted New York's election law as

having a so-called default remedy. Pet. App. 82 (discussing the purported default nature of Election Law § 6-110); *id.* at 23 (noting that the district court enjoined conventions "[b]ased upon the provision of state election law providing for primary elections as the default nominating process. . . . "). Nothing could be further from the truth. New York election law, far from defaulting to an open primary, clearly and unequivocally mandates that party nominations for the office of New York State Supreme Court Justice shall be conducted by party convention. *See* Election Law § 6-106. The statutory provision relied upon by the courts below, Election Law § 6-110, when read in conjunction with the remainder of the election law and with the relevant provision of the New York State Constitution, clearly carves this office out of the provision calling for the use of open primaries for other offices.[7]

If, as the district court purportedly held, it was using a so-called primary "default" already encompassed within New York's election law, then N.Y. Election Law § 6-136 should govern the signature requirements for such primaries. Yet, the district court invalidated the applicability of this election law provision finding that "[i]t cannot be said, as the defendants assume, that the legislature intended N.Y. Elec. Law § 6-136, in anything like its current form, to apply to primaries for Supreme Court Justice because no such primaries were contemplated." Supplemental Preliminary Junction Order dated April 7, 2006 at 3-4. Therefore, the invalidation of the provision of this election

[7] The justices of the supreme court shall be chosen by the electors of the judicial district in which they are to serve. The terms of the justices shall be fourteen years from and including the first day of January next after their election. N.Y. Const. art. VI, § 6[c].

law provision after conceding that it was constitutional is a recognition that the legislature never intended for the selection process for New York State Supreme Court Justices to "default" to an open primary.

B. The Rulings Of The Courts Below Sweep Too Broadly, Exposing Other Conventions And Screening Panels To Standardless Judicial Scrutiny

The Second Circuit's ruling is not confined to the facts of New York's nomination system for trial level judges. Rather, the Second Circuit's ruling would jeopardize all nomination systems that do not "afford candidates and voters a realistic opportunity to participate in the nominating process." Pet. App. 41. *See Terry v. Adams*, 345 U.S. 461 (1953). If not reversed, the litigation over the vague standard of what constitutes a "realistic opportunity to participate" will surely be expensive and burdensome.[8] Moreover, the number of such challenges could be substantial. If not reversed, the Second Circuit's ruling would apply to "each State-created or State-endorsed 'integral part of the election machinery.'" Pet. App. 38, 39 (citing *United States v. Classic*, 313 U.S. 299 at 316 and 318 (1941)). *See also* Pet. App. 38 (scrutiny would be applied to "all integral phases of the nominating process, regardless of whether the nomination is conferred directly by public

[8] *Cf. Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (First Amendment vagueness doctrine applies to government action relating to speech if the government regulates speech or conditions a generally available benefit upon the content of speech; *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("prohibition against vague regulations of speech").

ballot or indirectly by the votes of elected party officials" (citing *Moore v. Olgilvie*, 394 U.S. 814, 818 (1964)).

Despite paying lip service to the notion that not all convention systems are unconstitutional, a concession required by *American Party of Texas v. White,* 415 U.S. 767 (1974), the Second Circuit made clear that its ruling extends even to "facially valid regulations." Pet. App. 41. The blunderbuss approach of the courts below flows from the nature of the fact-finding below. Had there been a full trial on the merits, the respondents would have to prove "beyond a reasonable doubt" that the challenged statutes are unconstitutional. *New Alliance Party v. New York State Bd. of Elec.,* 861 F. Supp. 282, 292 (S.D.N.Y. 1994). Although the presumption of constitutionality is rebuttable, the standard in New York is that "[i]nvalidity must be demonstrated beyond reasonable doubt." *McGee v. Korman*, 70 N.Y.2d 225 (1987). The courts below erred by failing to apply this standard.

This Court has the power and, indeed, the responsibility to conduct *de novo* review of all constitutional facts and their application to the law. *See, e.g., Lilly v. Virginia*, 527 U.S. 116, 136 (1999) ("we have assumed, as with the other fact-intensive, mixed questions of constitutional law, that independent review is . . . necessary . . . to maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.") (citations and internal quotations omitted).

A close examination of the record highlights the vast difference of evidence produced at a preliminary injunction hearing as opposed to a full-blown trial. In this case, the application for the preliminary injunction was a technique

which enabled the plaintiffs in the district court proceeding to sidestep the evidentiary burdens, associated with a trial or summary judgment motion. The evidence was anecdotal, limited and redundant. The so-called voluminous "10,000-page preliminary record" which purportedly "establish[es] how the scheme functions" (Resp. Cert. Br. 2) consisted of copies of petition signatures, transcripts of judicial conventions throughout New York State, signature certifications, newspaper articles, some of them decades old, and even deposition transcripts from old unrelated cases, much of which was of little import and would probably have been inadmissible at a trial bound by rules of evidence.[9] The respondents called few witnesses in support of their contention about the unconstitutionality of the convention system. *See* Appendix 1. The so-called "evidence" simply does not support a sweeping statewide remedy. The courts below appear to have inferred that the

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[9] As stated in the Brief for the Appellants in Support of Reversal of the district court decision at n16: "The mountain of hearsay that the district court admitted into evidence is staggering. Such hearsay included: (1) news articles, many of which were opinion pieces and over a decade old (HE-4981-87 (Exs. 70-74); (2) documents with embedded hearsay, such as reports containing anonymous conclusions regarding conventions (HE-4988-5419, 5685-762 (Exs. 77-79, 90)); (3) the ten year-old transcript of Farrell's testimony from another case, from which the district court apparently made credibility determinations (SPA 33-35; HE 5960-6421 (Ex. 98), *see* Tr. 123-124; 1151; 1156-1163); and (4) impermissible opinion testimony (Tr. 30:8-19, 38:23-24; SPA 21-22). Although this evidence was inadmissible, *e.g.*, *Tasini v. New York Times Co.*, 184 F. Supp. 2d 350, 357 (S.D.N.Y. 2002) ('Newspaper articles are simply not evidence of anything'), and Appellants objected vigorously to its admission (*see, e.g.*, JA-1464-69, JA-1518-20), the district court decided that all hearsay was admissible in a preliminary injunction hearing. Respectfully, it was improper for the district court to have relied on such evidence to ground the issuance of final relief in the case."

problems encountered in a few counties or districts apply statewide. Testimonies of the petitioners' defense witnesses, many of whom were elected New York State Supreme Court Justices, were marginalized and, in some cases, completely disregarded as the district court relied on a handful of witnesses when it displaced the will of the legislature. Pet. App. 68, 109, 111, 122-125.

The rulings of the district court were rendered in a preliminary injunction hearing on a record that the parties did not believe would provide the basis for permanent injunctive relief. Pet. App. 77. This Court has correctly cautioned that findings in the preliminary injunctive context are inherently different from those needed for permanent relief. This Court has ruled that findings of "likelihood of success on the merits" are not "tantamount to decisions on the underlying merits"; the two are "significantly different." *University of Texas v. Camenisch,* 451 U.S. 390, 393-394 (1981).

The courts below did not heed the admonition of *Camenisch* and instead relied on the hearsay and anecdotal evidence adduced in the preliminary injunction hearing, without requiring the rigors of a full *evidentiary* trial on the merits. As a result, the district court's holding that a "realistic opportunity to participate" was denied rests almost entirely on the contention that the system should be invalidated because "county leaders . . . actually wield enormous and dispositive power in the process by which Justices of the Supreme Court are selected", delegates generally follow the wishes of their local district leader, and district leaders, in turn, generally follow the wishes of their county leader. Pet. App. 135. The courts below made this finding even though they acknowledged "that no

delegate testified to receiving express instructions on how to vote." Pet. App. 66.

It is, of course, not uncommon for delegates at political conventions to follow the lead of party insiders. If the clout of political leaders is the principal basis for judicial attack on a nomination system, the court of appeal's ruling could jeopardize an array of political conventions. For example, party leaders who are *not* elected through primaries make up over 800 delegates at the Democratic National Convention. These so-called superdelegates, who include Democratic members of Congress, governors and state party chairmen, will account for nearly 40% of the votes needed to clinch the nomination.[10] As one political source put it:

> "[t]hose [superdelegate] votes could mean the difference between victory and defeat for an upstart front-runner such as former Vermont Gov. Howard Dean. A narrow delegate lead in July may not be enough to protect him from a convention coup if party insiders decide one of his Democratic rivals would fare better in the general election. Those insiders could conceivably throw their votes to another candidate who brings a sizable number of his own committed delegates to the convention."[11]

Under the Second Circuit's standard, the Democratic National Convention's superdelegate system would surely be called into question. And the Republican Party would not be immune either. It has often been said that Republican

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[10] *What Chance of a Superdelegate Showdown at the Dem Convention*, The Hill (November 5, 2003) (avail. on NEXIS, News and Business file).

[11] *Id.*

leaders dictate their party's choice at the national conventions, leading the preseason favorite to win every Republican nomination since 1968.[12] As recently as 1996, half of all Republican primaries used winner take all systems, which tend to entrench front runners supported by party leaders.[13]

The national political conventions are not the only nomination system placed at risk. Ironically, the very screening panels supported by many who would reform the judicial selection process in New York would be exposed to judicial review.[14] Many of these screening panels (at least in New York) are state-sanctioned panels, appointed in part by the chief judge in the state.[15] If these panels serve their intended function, they will serve as gatekeepers, effectively reducing the choices available to the electorate since, in theory, only those candidates with the screening panels' "stamp of approval" will be viable[16] But in that case

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[12] Canellos, Peter, *Romney is Fast Rising as a Serious Contender*, The Boston Globe, December 12, 2006.

[13] The Green Papers, Election 2000-2004 Glossary (available at http://www.thegreenpapers.com/Definitions.html).

[14] Ironically, the district court wrote that "[t]he screening panel in the First Judicial District has had a salutary effect on judicial selection. Specifically, it has made it much more likely that the candidates selected by the county leaders are highly qualified. The panel is constituted pursuant to a "double-blind" procedure that ensures an important measure of independence. Though it is not free of political influence altogether, the county leadership deserves praise for having created it many years ago and for abiding by its decisions." Pet. App. 148.

[15] 22 NYCRR Part 150, Rules of the Chief Administrative Judge.

[16] New York State officials have expressed expectation that the commissions will be gatekeepers. "Although the commissions findings will might be binding, Judge Jonathan Lippman, the Chief Administrative Judge of the State of New York, said he expects that party leaders

(Continued on following page)

the screening panels would arguably be subject to judicial scrutiny as a "State-created or State-endorsed 'integral part of the election machinery. . . . '" Pet. App. 39, citing *Classic*, *supra* at 318. As such, the upshot of the Second Circuit's opinion would mandate that voters be given "a realistic opportunity to participate" in the screening panel's deliberations. Such public access would effectively destroy the candid discussions necessary for screening panels to function.

C. The Remedy Imposed by the Courts Below Was Geographically Overly Broad

The district court invalidated the entire statewide system even though it acknowledged that the situation in the First Judicial District, only *one of the twelve* New York judicial districts was the "dominant subject by far" in the preliminary injunction hearing. Pet. App. 132. Remarkably, far from finding that the situation in the First Judicial District rose to the level of unacceptably unconstitutional atrocity, the district court held that the nomination process in the First Judicial District is characterized by "a measure of quality control that is unmatched in the state." Pet. App. 132.

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will demand the commissions' Good Housekeeping Seal of Approval and that if they don't, the voters will." The executive director of the Fund for Modern Courts, Dennis Hawkins, said he agrees the voters will heed the commissions' suggestions. Like the New York State Bar Association, Mr. Hawkins advocates a constitutional amendment that would replace the current election system with appointments, but he said he believes that the commissions are step in the right direction." *No State Judges Move to Bolster Public's Confidence*, The New York Sun, February 9, 2007.

The findings of the courts below in the other judicial districts are even less explicable. In its recitation of the facts, the district court *does not even mention* the Fifth, Sixth, Eleventh, and Twelfth Judicial Districts. Pet. App. 132-149. In two sentences reciting purported facts that were unburdened by any citations to the record, the district court found the nomination system that was used in the Third Judicial District to be unconstitutional. Pet. App. 143.

The district court's findings with respect to the Second, Fourth, and Seventh Judicial Districts rely on evidence that is, at best, anecdotal. Aside from a citation to hearsay (Pet. App. 136 n.32), the discussion of the Second Judicial District focuses almost entirely on the travails of named plaintiff Margarita López Torres (Pet. App. 136-143). Likewise the discussion of the Fourth District centers on Justice Joseph Sise (Pet. App. 143-145) to the exclusion of virtually anything else. And the analysis of the Seventh District relies heavily on the experience of John Regan. Pet. App. 146-147. Such anecdotes demonstrate, at most, that the convention system has failed in three particular instances which are scattered over a decade and provide little basis for a sweeping invalidation of the entire convention system.

II. The Courts Below Should Have Taken Into Account The Impact A Partisan Open Primary Would Have On Racial Diversity

Instead of imposing a default remedy based upon a misreading of New York's election law, the courts below should have conducted full fact finding, including a consideration of the impact of their remedy on the diversity of the bench and the constitutional rights of ethnic minorities, such as Asian Americans.

Such fact-finding may well have shown that convention systems promote the interests of diversity.[17] By way of example, pure convention systems, largely not influenced by primary elections, resulted in the nominations of the first Catholics ever nominated to national tickets (Al Smith, 1928, and John Kennedy, 1960), the first woman ever nominated on a national ticket (Geraldine Ferraro, 1984), and the first Jewish candidate on a national ticket (Joe Lieberman, 2000). Ferraro and Lieberman were nominated as vice presidential candidates, for which no primary votes were cast. In contrast, since the advent of primaries as the principal basis for selecting presidential nominees only white Protestant males have been nominated by the national conventions of both parties.[18] This example of the national party conventions demonstrates that, at minimum, further fact-finding was warranted as to whether the interests of diversity are better served by a convention system as opposed to open primaries.

More complete fact-finding may also have shown that open primaries are inimical to the cause of diversity. As set forth below, the results of open primaries in other jurisdictions should, at minimum, call into question any contention that open primaries promote diversity.

II. A Partisan Open Primary Election System Will Likely Disadvantage Asian Americans Because Voting Will Tend To Take Place Along Ethnic Lines

The experience of Asian Americans in states with partisan election systems provides strong support for several of the opinions expressed by the petitioners' expert, Dr. Michael Hechter, Emeritus Professor of Political Sociology at the University of Washington. As Dr. Hechter testified, voting in judicial elections tends to take place along ethnic lines:

> "[T]he tyranny of the [majority] is always a problem in direct election. There can be persistent underrepresented minorities who can never win the election because there aren't enough of them. . . . There are not enough registered voters ever to prevail in that unit. They will always be consistently out voted."

(Tr. 1223:8-24). Dr. Hechter's conclusions are supported by court decisions concluding that New York politics is characterized by bloc voting and racial polarization. *See, e.g., Puerto Rican Legal Defense and Education Fund, Inc. v. Gantt*, 796 F. Supp. 681, 685 (E.D.N.Y. 1992) (African American and Latino voters in the state of New York had established the existence of racial bloc voting); *Butts v. City of New York*, 614 F. Supp. 1537, 1547 (E.D.N.Y. 1985)

("racial and ethnic polarization and bloc voting exists in New York City to a significant degree").

In the district court proceeding, New York State Senator Martin Connor also attested to the strength of bloc voting in New York, testifying that, in an open primary in the Second Judicial District, "you could not elect an Italian American, an Irish American, maybe have a hard time with a Latino." (Tr. 2124:4-2125:4). *See also* Testimony of Dennis Ward (Tr. 343:23-344:1) (stating that, in the Eighth Judicial District, no ethnic minorities would ever win a party nomination in an open primary system).

For Asian Americans, the picture may be even bleaker. As one of the few Asian Americans to win election to the judiciary in Illinois, Judge Sandra Otaka, has stated:

> "[I]f African Americans cannot [elect their candidates] at 22% how in the Sam Heck are we going to do it at 4% when you have the name Fujimoto or Svrapi Punja [on the ballot] in Illinois? I was told to put an apostrophe after my O because if I did that, I would have a greater chance at winning county-wide. The bottom line is in Cook County and I imagine other places. . . . if it isn't O'Brien or O'Malley or it isn't Smith or it isn't a name that they have a level of comfort with, then it's going to be a lot more difficult for them to get elected. *Let me tell you, having an Asian name does not facilitate access to election through the political process* [emphasis added]."[19]

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[19] Judge Otaka was quoted in Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, at 17.

The extent of the uphill battle that Asian Americans may face in seeking elective office is further demonstrated by the fact that recent polls show that as many as 30% of Americans believe that Chinese Americans are more loyal to China than they are to the United States, and that 25% of those polled are unsure.[20] As recently as 1997, Asian Americans were "publicly attacked as disloyal to the United States . . . Asian American political interests found themselves on the very public receiving end of bipartisan hostility."[21] Asian Americans have been regarded as "immutably foreign and unassimilable with whites on cultural and racial grounds in order to ostracize them from the body politic and civic membership."[22] As one commentator suggested, "I ask you whether the electorate voting for a candidate who is Chinese American running for judicial office is likely to vote for that candidate if they hold those kind of suspicions?"[23]

Moreover, Asian Americans suffer from low voter registration and turnout. For example, in 1995, only 20% of all eligible Asian American voters in Flushing, Queens, were registered to vote.[24] And whites have a voting rate

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[20] These figures are presented by Professor Sherrilyn Ifill and appear in Lawyers' Comm. For Civil Rights Under Law, *id.* at 18.

[21] Kim, Thomas P., *The Racial Logic of Politics: Asian Americans and Party Competition*, Temple Univ. Press (2007) at 2.

[22] *Id.*, quoting Claire Jean Kim, *The Racial Triangulation of Asian Americans*, Politics and Society 27 (March 1999) at 105-138.

[23] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selections Models and their Impact on Diversity*, June 2005, *supra*.

[24] Dugger, Cecilia W., *Queens Old Timers Uneasy as Asian Influence Grows*, New York Times, March 31, 1996 at A1.

nearly double that of Asian Americans.[25] Perhaps because of such factors, even as their numbers have increased, Asian Americans have not attained commensurate political clout. In Los Angeles, New York and San Francisco, the three cities with the highest populations of Asian Pacific Americans, Asian Pacific Americans hold only one out of a total of seventy-seven city council seats elected by single-seat districts[26] in these three cities. Strikingly, no Chinese American city council member has ever been elected in the Manhattan City Council District that encompasses Chinatown.[27] Until recently, a Queens district with a more than 30% Asian American population was represented by a city councilwoman who described the influx of Asian Americans as "an invasion, not an assimilation" and described Asian Americans as "more like colonizers than immigrants."[28]

The district court recognized that, at a minimum, diversity in the judicial selection process is "a legitimate state interest." Pet. App. 174. Asian Americans are, of course, a significant part of that diversity. The district court, however, did not adequately consider, and failed to

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[25] Hajnal, Zoltan and Trounstink, Jessica, *Where Turnout Matters: The Consequence of Uneven Turnouts in City Politics*, The Journal of Politics, Vol. 67, No. 2, May 2005 pp. 515-535 (at the local level whites outvote Latinos and Asian Americans by a voting rate ratio of almost two to one).

[26] Hill, Steven, *New Means for Political Empowerment in the Asian Pacific American Community*, Asian American Policy Review (Spring 2001).

[27] Aoki, K., *Asian Pacific American Electoral and Political Power, Panel I: A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power after 2000*, 8 UCLA Pac. Am. L.J. 1, 24.

[28] *Id.* at 30.

protect, that interest in diversity when it imposed its remedy. The district court also failed to take into account the associational rights of minorities, such as Asian Americans, to organize and participate within the political parties of their choosing and within that party's chosen method of nominating judicial candidates – a process that Dr. Hechter described as logrolling. Those associational rights are, themselves, a compelling state interest, which was sufficient to uphold the convention system. Simply put, the district court did not, as it claimed, impose "the least intrusive course" when it directed open primaries. Pet. App. 183-184.

III. District-Wide Judicial Elections In New York State Would Be Prohibitively Expensive

What makes the New York State Supreme Court different from other courts within the state is the vast scope of its jurisdiction over subject matter in law and equity and its unlimited monetary jurisdiction.[9] N.Y. Const. art. VI, § 7[a]. There is a great deal at stake, especially financially and especially within the major urban and suburban judicial districts, in which there are large, long-standing, well-established social, financial and commercial interest and in which most Asian Americans in the state are located. The inherent unseemly nature of raising large sums of money to fund expensive campaigns

[9] In addition, justices who are elected to the New York State Supreme Court may be eligible to serve as justices of its Appellate Terms or Appellate Divisions, which control the licensing, admission and discipline of attorneys. Justices who serve in the New York State Supreme Court also control most of the court appointments of attorneys and other professionals in civil and criminal matters as well as setting the fees and reimbursements for expenses for those appointees.

for judicial races, particularly for sitting New York State Supreme Court justices, threatens the independence of the judiciary. This was apparent to the New York State Legislature in 1921 when it rejected the direct open primary system it had enacted in 1911 by enacting the convention system which is currently in place. Pet. App. 9.

The expense of a partisan open primary system may also adversely affect the prospect of a diverse judiciary. There is every reason to believe that, as stated in the Final Report to the Chief Judge of the State of New York of the Commission to Promote Public Confidence in Judicial Elections (the "Feerick Commission"), "primaries pose a great risk of attracting substantial increases in partisan spending on New York State judicial campaigns, which, as our research shows, would serve to further undermine confidence in the judiciary."[6] The negative impact of prohibitively expensive district-wide judicial open primaries would affect Asian Americans as their population concentration is within the New York City metropolitan area – the most expensive media market in the country.[7]

The negative impact of these open primaries affect the rural areas in upstate New York, too. In its two-page *amicus* brief to the Second Circuit in this case, the St. Lawrence County Bar Association cogently expressed concern that the remedy of imposing open primaries is "the worst possible solution."[8] The St. Lawrence County Bar Association further stated in its brief that "[t]he

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[6] Feerick Commission Report at 3 (Feb. 6, 2006).

[7] See SB139 Service Reports (Standard Rate and Data Service).

[8] St. Lawrence County Bar Association Amicus Curiae Brief in Support of Reversal of the district court decision, No. 8.

parties will be unable to create balanced slates including a group of candidates based on gender, race and *geography* [emphasis added] . . . ", that "[t]he Fourth Judicial District [in which St. Lawrence County is located] encompasses the largest, most rural counties in New York State and thus, candidates would have to circulate petitions covering a substantial geographical area . . . ", that "[t]he expense of participating in such primaries would be exorbitant . . . " and that "[t]he northern-most Counties in this State would most likely *not* have resident Justices, instead being served by Justices elected from the far-flung counties Schenectady and Saratoga, requiring counsel and litigants, alike, to drive substantial distances, thus increasing the cost of litigation to those of the most rural population who, presently, can least afford legal representation."[9]

Indeed, as the respondents themselves have conceded, New York is one of the most expensive states in which to run a campaign.[10] For example, general election legislative candidates (who run in districts that are often less populous than the areas in which a State Supreme Court Justice would be forced to run) raised a total of more than $50 million in New York State in 2004.[11] Some New York State Senate races have generated spending of more than $3 million per candidate, in one case amounting to more

[9] *Id.*

[10] See Declaration of William Lipton in Support of Plaintiffs' Motion for Preliminary Injunctive Relief, dated June 1, 2004 (JA300).

[11] Common Cause, The $1,000 Club: What New York State Political Campaigns Cost This Much, Those Costs are Rising and Who's Picking Up the Bill (March 2006) at 3.

than $51 per vote.[36] Even non-New York City races can cost millions of dollars: the 2005 race for Westchester County Executive cost a total of almost $4 million and the race for Westchester County Clerk cost a total of $673,931.[37]

The expense of campaigning for judicial office may impose disproportionate burdens upon Asian Americans and other members of minority groups. As Geri Palast, Executive Director of Justice at Stake Campaign,[38] has stated, "The high cost of campaigns poses a threat to minority candidates who may not be able to raise as sufficient a war chest to be competitive in these elections."[39] Professor Spencer Overton, a Professor of Journalism at George Washington University School of Law, has also noted that, although minority group members make up almost 30% of the nation's population, they make up less than 1% of the contributors to federal campaigns.[40]

In fact, over 55% of the contributions by candidates in New York State campaigns during 2002, 2004 and 2005 have come via checks written for more than $2,100 (the federal contribution limit) and, thus, would have been

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[36] *Id.* at 9.

[37] *Id.* at 10.

[38] Justice at Stake Campaign is a "nationwide, nonpartisan partnership of more than thirty judicial, legal and citizen organizations" seeking to "campaign for fair and impartial courts." http://www.faircourts.org/contentviewer.asp?breadcrumb=8,384

[39] Lawyers' Comm. For Civil Rights Under Law, *Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and their Impact on Diversity*, June 2005, *supra*, at 15.

[40] *Id.*

illegal in a federal election." As a result, a comprehensive study of nationwide legislative elections found that "white candidates for contested seats typically spent more than minorities in similar states."[7] As Professor Ira Rohter, an Associate Professor of Political Science at the University of Hawaii at Mānoa, said, "People in minority groups typically are lower-income, and they don't have access to the kinds of corporate funding that white people normally would." *Id.*

For this reason, the American Bar Association has supported public financing of judicial elections "to create more opportunities for attorneys of all racial and ethnic backgrounds who do not have . . . the personal or political connectedness to raise large sums of money for elections."[8] However, the remedy imposed by the courts below does not – and cannot – provide for public financing, and there is no reason to believe that such financing is politically or fiscally feasible in an era of soaring budget deficits.

Professor John D. Feerick of Fordham University was quoted saying: "[t]here was no enthusiasm for a primary without public financing and there is no political reality for a vast public financing system." Jennifer Medina, *Albany Is Split Over a Plan to Pick Judges*, New York Times, February 28, 2006. As stated in the Feerick Commission Report at Page 11, "without public financing of judicial elections, the judicial nominating convention . . .

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[7] Common Cause Report, *supra*, at 3.

[8] See Mark Hansen, Study: Minority Candidates for State Office Often Raise Less Money, Associated Press, March 29, 2006.

[9] Lawyers' Comm. For Civil Rights Under Law, Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and their Impact on Diversity, June 2005, *supra*, at 15 & n.51.

system should be retained rather than replaced by primary elections."

Thus, for the foreseeable future, if the remedy imposed by the courts below is not reversed, it will inflict crushing financial burdens upon minority candidates seeking judicial office.

IV. The Courts Below Erred By Permitting The Enactment Of New State Action In The Form Of Open Primaries After Striking New York's Judicial Convention Statutes in Their Entirety

Assuming that it was proper for the district court to refrain from following *Ayotte* and *Booker* and thereby striking the entire convention statutes, it was improper for the courts below to impose new state action in the form of open primaries as a core power reserved for the states in the United States Constitution in determining the time, place and manner of the election of state officers. See e.g., *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), citing *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) ("States retain the power to regulate their own elections."). Rather than proceed cautiously so as not to trespass on the constitutional prerogative of New York State, the district court mandated open primaries upon New York State, baldly stating that it would have been "irresponsible" for it to have "left such a gaping hole in the State's electoral scheme." Pet. App. 82. Its conclusion, however, rests on the flawed assumption that party nominations require state regulation. New York's political parties used nominating conventions between the years 1846 to 1911, notwithstanding the absence of any statute mandating